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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,) Cause No. CR-05-07-M-DWM
)
)
 vs.) **DEFENDANT JACK W.**
) **WOLTER’S MOTION FOR**
) **JUDGMENT OF ACQUITTAL**

 W. R. GRACE, HENRY A.)
 ESCHENBACH, JACK W.)
 WOLTER, WILLIAM J. MCCAIG,)
 ROBERT J. BETTACCHI, O.)
 MARIO FAVORITO, ROBERT C.)
 WALSH,)
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 Defendants.)
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I. INTRODUCTION

On April 8, 2009, after the Government had presented almost seven weeks of testimony and entered more than 240 exhibits into evidence the Court asked the Government, “[w]here is the conspiracy? At some point you have to prove that. You have to prove there was an agreement to do something illegal.”¹ In response, the Government acknowledged that it had not yet proved the existence of a conspiracy and asked the Court for patience while the prosecution constructed a “bridge” of evidence that would constitute such proof.²

Since that day, the Government has put on 25 witnesses, and entered dozens more exhibits into evidence. None of that evidence, individually or in combination with other record evidence, is sufficient to establish beyond a reasonable doubt that the Defendants agreed to commit an illegal act. Despite its representations to the Court, the long-promised “bridge” has failed to materialize.

There is no evidence from which any rational jury could conclude that Defendant Jack Wolter agreed to release asbestos knowing at the time that he would be placing one or more residents of Libby in imminent danger. In fact, the evidence is overwhelmingly to the contrary. Jack Wolter spent his career at Grace working to reduce fiber exposures in Libby and throughout Grace’s nationwide network of expanding plants, all in an effort to protect the health and welfare of

¹ Trial Transcript (“Tr.”) Tr. 4636:14-24 (Apr. 8, 2009).

² Tr. 4641:17-18 (Apr. 8, 2009).

workers and consumers who might be exposed to asbestos. Further, the evidence shows that Wolter exposed himself, his wife, and his business partner to the very same conditions the Government claims he knew were dangerous. That evidence is undisputed and dispositive; no reasonable jury could infer from Wolter's actions that he believed he was putting himself or any residents of Libby at imminent risk of serious bodily injury or death.

Nor is there any evidence that Wolter agreed to defraud the United States. The Government has failed to present any evidence from which the jury could infer that Wolter knew Grace had any obligation to disclose to the government the health studies and product test results at issue. The Government itself admitted that it cannot prove conspiracy merely by showing that Wolter was copied on internal corporate documents.³ Yet, that is the sum total of the proof with respect to this object of the alleged conspiracy.

Since the return of the original indictment in this case, the Defendants have argued that the sweeping 198-paragraph indictment is fatally flawed. Count One alleges a sprawling dual-object conspiracy that allegedly began in the mid-1970s and continued nearly thirty years, until 2002. But that alleged conspiracy is a fiction, contrived to evade the limitations period. Consequently, it lacks coherence, logic, or proof of any agreement. Recognizing the impossibility of

³ Tr. 4636:4-5 (Apr. 23, 2009) (“[I]t is not our theory that simply having your name on a copy line draws you into a conspiracy”).

proving that any of the Defendants actually released asbestos within the statute of limitations period, the Government charged them in Counts Three and Four of knowingly “causing” a release of asbestos after 1999 by the mere act of “selling” real property in the early 1990s. Those illogical and convoluted charges are without support in fact or law.

The Court deferred many of the Defendants’ legal objections until the close of the Government’s evidence so as to allow the Government an opportunity to support its allegations. That day has arrived and, as set forth below, the Government’s evidence falls far short of proving the Government’s tortured legal and factual theories.⁴

II. **ARGUMENT**

For the convenience of the Court, this motion focuses on the evidence and arguments specific to Defendant Jack Wolter. We respectfully incorporate by reference the arguments made by the other Defendants that are equally applicable to him.

A. **Wolter is Entitled to Judgment of Acquittal on Count One.**

Count One charges Wolter and his co-defendants with conspiring (1) to knowingly release, or cause to be released, asbestos into the ambient air, knowing that doing so would place members of the Libby community in imminent danger of

⁴ Pursuant to Local Rule 12.2, counsel for Defendant Wolter contacted the Government before filing this motion. The Government opposes the relief requested.

death or serious bodily injury; and (2) to defraud the United States by impeding the legitimate functions of EPA and NIOSH.⁵ Defendant W.R. Grace's ("Grace") motion for judgment of acquittal contains a comprehensive recitation of the law related to Count One, which we incorporate by reference. To summarize, however, to prove a conspiracy under section 371 the Government must establish: (1) an agreement to do something unlawful as described in the indictment; (2) one or more overt acts in furtherance of the conspiracy, and (3) the intent to commit the underlying substantive crime. *United States v. Sullivan*, 522 F.3d 967, 976 (9th Cir. 2008) (quotation marks omitted); *United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993).

No reasonable jury could find these elements beyond a reasonable doubt based on the evidence presented in the Government's case-in-chief. While the conspiracy allegations in Count One give rise to complex *mens rea* requirements, the precise contours of those requirements are immaterial in light of the fact that the Government has failed to prove any type of criminal intent whatsoever. Proof of Count One fails on that basis alone. The complete absence of evidence of any agreement to commit an unlawful act is similarly fatal to the legal sufficiency of this claim.

⁵ Superseding Indictment ("SI") ¶ 71.

1. There is No Evidence Wolter Agreed to Endanger Anyone.

The Government has failed to introduce sufficient evidence from which the jury could find either the existence of an agreement to endanger the residents of Libby or that Wolter joined such an agreement. *Caldwell*, 989 F.2d at 1059. Far from agreeing to endanger the people of Libby by releasing asbestos into the air, the evidence proves that the Defendants undertook a long-term, concerted effort to *protect* the health of Grace employees in Libby by reducing exposures to the lowest possible levels.

a. Pre-November 15, 1990 Evidence

Wolter joined Grace in September 1975 as the Vice President of Manufacturing and Engineering.⁶ He was responsible for mining and engineering operations at Libby and Enoree and Grace's network of expanding plants.⁷

In 1977, Grace, under the leadership of the Executive Vice President of CPD Elwood "Chip" Wood, undertook a comprehensive review of tremolite issues, including the impact new government asbestos regulations potentially would have on CPD's business.⁸ Wood convened, and Wolter participated in, a series of "contingency planning" meetings to discuss these issues.⁹

⁶ DX 14007; Tr. 3174:24-3175:23 (Mar. 18, 2009).

⁷ Tr. 3176:17-19 (Mar. 18, 2009); Tr. 4604:8-11 (Apr. 8, 2009).

⁸ Tr. 2721:1-10; 2807:18-2808:18 (Mar. 16, 2009).

⁹ Tr. 2760:13-2762:20 (Mar. 16, 2009).

In March 1977, Wood issued a memorandum setting forth three guiding principles for CPD with respect to tremolite issues.¹⁰ First, Grace would “not expose [its] customers and employees to environments which have been formally defined as hazardous by the U.S. Government without proper caution as to the nature of the hazard.”¹¹ Second, “[t]he tremolite asbestos fiber count limits . . . enumerated in OSHA (or MESA) regulations will be the guide to whether a health hazard exists.”¹² Finally, “[c]ustomer, user and Government agency inquiries . . . will receive straightforward and candid responses” with respect to what Grace knew about its products.¹³

Wood’s memorandum refutes the Government’s allegation that, “beginning on or about 1976,” the Defendants entered into an agreement to endanger.¹⁴ Indeed, the memorandum (Government Exhibit 90), alone, establishes the existence of reasonable doubt with respect to the alleged endangerment conspiracy. The memo clearly establishes that CPD managers, including Wolter, were resolved *not to expose* customers or employees to hazardous levels of asbestos.

Wood’s memorandum also established the PEL as a measure of safe exposure levels within CPD. Wood reached that decision only after Grace

¹⁰ GX 90.

¹¹ GX 90 at 1.

¹² GX 90 at 2.

¹³ GX 90 at 2.

¹⁴ SI ¶ 71.

consulted with several experts who advised that there was no convincing evidence of an excess risk of disease for exposures within the PEL.¹⁵ In a subsequent memorandum to his superiors in New York, Wood emphasized that “we do not believe that asbestos exposure from our products causes an increased risk of health problems.”¹⁶ “[T]ypical” exposures average 0.5 f/ml (TWA) and are “not considered a hazard.”¹⁷

Wood was Wolter’s boss, and the evidence clearly establishes that Wolter adhered to this directive. As head of manufacturing, Wolter was tasked with ensuring that fiber exposures at Grace facilities not only met but were maintained at a level well below the PEL.¹⁸ To create a comfortable “margin of safety . . . for [its] employees,” CPD adopted an internal goal equal to half the PEL.¹⁹

On March 21, 1977, Wolter issued a memorandum stating CPD’s “basic guidelines” with respect to fiber reduction.²⁰ Wolter directed that “[a]ll CPD expanding plants will be scheduled to attain the OSHA regulatory fiber count by 1/1/78.”²¹ Although Libby was then governed by the MESA PEL of 5 f/cc, Wolter ordered Libby to comply with the OSHA PEL and to achieve compliance by the

¹⁵ GX 108 at 24-25.

¹⁶ GX 108 at 8; *see also* GX 108 at 13 (“[W]e do not feel that our products create a hazard for normal end uses.”)

¹⁷ GX 108 at 25.

¹⁸ DX 14015; Tr. 4362:24-4366:12 (Mar. 26, 2009).

¹⁹ GX 108 at 24, 25.

²⁰ DX 6665.

²¹ DX 6665 at 1.

same deadline as the expanding plants.²² Finally, Wolter ordered that “[a]ll product[s] sold by CPD to either industrial or consumer [customers] will attain a 1.6 TWA or 8 fibers/ml 15-minute time exposure by May 1, 1977[,]” a level below the PEL, in order to create a “25% safety factor.”²³

In Libby, Wolter moved aggressively to drive fiber levels down.²⁴ He worked to bring the new wet mill on line.²⁵ He obtained the funds to set up a fiber counting lab at Libby, which allowed Libby’s health and safety staff to analyze air samples themselves. This, in turn, reduced both the time involved in sending the samples to Cambridge and increased the number of samples that could be analyzed in a given month.²⁶

Wolter also focused on reducing the amount of tremolite in vermiculite concentrate. He funded engineering improvements to reduce fiber exposures throughout the Libby mine and mill.²⁷ Wolter implemented “selective mining” to identify ore with the lowest amount of tremolite.²⁸ He devised new methods of screening the ore during the milling process to more effectively remove tremolite

²² *Id.*

²³ *Id.*

²⁴ Tr. 2894:7-10 (Mar. 17, 2009); 5294:17-24 (Apr. 13, 2009).

²⁵ Tr. 3177:2-12 (Mar. 18, 2009).

²⁶ DX 14005; Tr. 3513:23-3514:25 (Mar. 19, 2009).

²⁷ DX 6652; Tr. 2898:15-2902:16 (Mar. 17, 2009); 5294:22-24 (Apr. 13, 2009); DX 18740 (baghouse discharges, surge hopper vents, feeder hoods, stoner discharge, discharge gates).

²⁸ Tr. 3509:6-3510:22 (Mar. 19, 2009).

and other contaminants.²⁹ At the Libby screening plant, a soybean oil spray system was used to coat concentrate and reduce fiber releases after it had been milled.³⁰ Libby environmental engineer Randy Geiger testified that Jack would approve nearly any request to pay for dust reduction measures even if the request was as short as two sentences.³¹

At the same time, Grace implemented a program to monitor workers' health.³² The health monitoring program included yearly x-rays and pulmonary tests.³³

Wolter also put in place aggressive fiber reduction measures at the expanding plants. He did so principally by enclosing the expanding process to contain the dust it generated.³⁴ As David Walczyk explained, Wolter never "cut corners" when it came to worker safety.³⁵ "If we had an idea that had any promise at all [to reduce fibers], we got the funds to do it."³⁶ Although the expanding plants were inspected for compliance with the PEL, Wolter was concerned that plant managers might be cleaning up their plants in anticipation of those

²⁹ Tr. 3510:23-3512:10 (Mar. 19, 2009).

³⁰ Tr. 4799:19-25 (Apr. 9, 2009).

³¹ Tr. 5294:25-5295:6 (Apr. 13, 2009).

³² GX 80.

³³ Tr. 3687:23-3688:3 (Mar. 23, 2009).

³⁴ DX 14062; Tr. 4929:10-4930:18 (Apr. 9, 2009).

³⁵ Tr. 4927:20-22 (Apr. 9, 2009).

³⁶ Tr. 4927:25-4928:1 (Apr. 9, 2009).

inspections. To get a truer picture of fiber exposures, Wolter instituted surprise inspections at the expanding plants.³⁷

Separately, Wolter established a procedure to ensure that “corrective action” would be taken at the expanding plants whenever air sampling results showed fiber exposures in excess of OSHA limits.³⁸ That procedure not only required the employee to be notified, but also triggered a tight timetable by which the plant manager was required to correct whatever condition gave rise to the non-compliant test result.³⁹

Wolter’s efforts to reduce fibers at Libby and the expanding plants were successful. Even as the Government’s exposure standards fell, Wolter ensured that Grace met them.⁴⁰ In 1977, fiber levels in the expanding plants occasionally exceeded 2 fibers/cc.⁴¹ By July 1980, they had been reduced to an average of .21 fibers/cc with no samples above .5 fibers/cc—all at a time when the PEL was 2 f/cc.⁴²

Results at Libby were similar. Air sampling in 1976-1977 revealed that exposures at Libby sometimes approached 5 fibers/cc.⁴³ Similarly, from 1977 to 1982, the amount of tremolite in Libby concentrate (measured after it was milled)

³⁷ DX 7389; Tr. 4370:7-4371:17 (Mar. 26, 2009).

³⁸ DX 14015; Tr. 4366:10-12 (Mar. 26, 2009).

³⁹ DX 14015; Tr. 4362:24-4365:24 (Mar. 26, 2009).

⁴⁰ Tr. 4367:4-4368:18 (Mar. 26, 2009); 4810:25-4812:19 (Apr. 9, 2009).

⁴¹ DX 14015.

⁴² DX 13139.

⁴³ GX 108 at 24.

declined across every grade of vermiculite to a low of .26 for L4.⁴⁴ After 1983, the general downward trend continued.⁴⁵

Wolter was equally successful in reducing exposures from Grace's finished products. In 1983, Wolter took stock of existing tremolite levels in vermiculite concentrate and finished products. He wrote that "[a]t present, we can say with confidence that our expanded finished products contain only trace amounts of contamination and in many instances are actually 'non-detectable'."⁴⁶ Tremolite levels were a fraction of the PEL, with vermiculite sizes L1 - L4 averaging less than .10% by weight, and TWA fiber counts for industrial and consumer products averaging from .019 fibers/cc to .65 fibers/cc.⁴⁷ Despite these successful results, Wolter pressed for still greater reductions. He convened an "all hands" meeting "intended to be a barnstorming [sic] period in order to bring out areas that are most fruitful for investigation and determine which groups or departments should both focus attention and allocate manpower accordingly." He called upon "all interested parties" to "continue to maximize our effort in removing tremolite to the maximum degree technologically feasible."⁴⁸

⁴⁴ GX 369 at 06.

⁴⁵ DX 5444.

⁴⁶ DX 5868.

⁴⁷ DX 14010 at 3.

⁴⁸ DX 14010 at 1.

This evidence is unequivocal proof that Wolter intended to protect the workers of Libby and consumers of Grace's products through the mid-1980s. It makes no sense that, while Wolter was working tirelessly toward those goals, he simultaneously agreed to endanger members of the Libby community to which many of the Grace workers belonged. Instead, this evidence supports a reasonable inference that, consistent with his behavior, Wolter agreed to endanger no one.

If the evidence proves the existence of any agreement, it is an agreement among the executives and employees of Grace in Cambridge, Libby, and the expanding plants to ensure that tremolite exposures were below Government limits and, in fact, as low as was humanly possible. The purpose of the agreement was obvious: to keep Grace workers and consumers of Grace products safe.

b. ***Post-November 1990 Evidence***

Although the Government can rely on pre-1990 evidence to establish the endangerment object of the conspiracy, it must prove that after November 1990 Wolter adhered to recognized and re-affirmed the alleged pre-existing agreement.⁴⁹ This, too, the Government has failed to do. Because Grace closed the Libby mine and mill in September 1990, Wolter's actions in operating those facilities cannot serve as proof that he participated in an agreement to release asbestos into the ambient air after the effective date of the Clean Air Act. The evidence concerning

⁴⁹ Proposed Instruction No. 7-W.

Wolter's conduct after November 1990 was limited, consisting of testimony from Paul Peronard, Mel and Lerah Parker, Jack DeShazer, Mark Owens, and Dale Cockrell, nine Government Exhibits and three Defense Exhibits. Careful review of this evidence reveals no indication whatsoever that, any time after November 1990, Wolter believed Libby vermiculite was dangerous or that he entered into or reaffirmed any pre-existing agreement to endanger Libby residents.

Following the closing of the Libby facility, Grace decided to sell its Libby properties. Alan Stringer hired a local realtor, Jack DeShazer, to assist with the sale of the smaller parcels, including the Screening Plant.⁵⁰ There is no evidence that Wolter had any involvement in the marketing and sale of those properties. DeShazer testified that he dealt only with Stringer in connection with those sales.⁵¹

Stringer's description of the marketing and sales, reflected in a memorandum to Wolter after the completion of those sales, does not reflect any involvement by Wolter.⁵² Rather, it is an after-the-fact summary of actions taken independently by Stringer. Although the Parkers testified that they met with Wolter, that meeting occurred in early 1994, more than a year after the Parkers had entered into the agreement to purchase the Screening Plant.⁵³

⁵⁰ Tr. 5589:15-5590:12 (Apr. 14, 2009).

⁵¹ Tr. 5590:3-5 (Apr. 14, 2009); 5591:14-5593:2 (Apr. 14, 2009).

⁵² GX 608 at 6-7.

⁵³ Tr. 1354:22-1335:6 (Mar. 3, 2009); 1525:13-17 (Mar. 4, 2009); GX 604.

In the meantime, Grace also undertook efforts to sell the 3,700 acre mine site. Wolter was copied on three letters involving Grace's discussions with 3M,⁵⁴ and he signed a form letter sent to the Parkers and other interested buyers which, as Lerah Parker testified, appeared to have been written by an attorney.⁵⁵ This letter was dated October 12, 1993, after the Parkers had moved onto the Screening Plant property.⁵⁶ The letters to 3M show that Grace disclosed the presence of asbestos and other environmental issues to potential buyers of the mine site, and that Wolter knew of those disclosures.⁵⁷

In 1992, Wolter received a memo from Alan Stringer attaching fiber testing results conducted by Lincoln County personnel on Rainy Creek Road and at the mine site. Those results showed that "exposure for all of the areas is considerably well below the OSHA standard of 0.2 f/cc."⁵⁸ In summarizing this testing, Stringer actually underestimated the fiber readings considerably, as the vast majority were at or below .002 f/cc.⁵⁹ Fiber testing results at those levels, the only ones in the record as to Wolter, supported a reasonable belief that there was no risk of endangerment at those areas.

⁵⁴ GXs 581, 584, 586.

⁵⁵ Tr. 1554:12-1556:1 (Mar. 4, 2009).

⁵⁶ GX 609; Tr. 1515:1-2; 1341:8-10 (Mar. 4, 2009).

⁵⁷ GX 586.

⁵⁸ GX 596.

⁵⁹ *Id.*

In 1993, Wolter wrote a memo to the file about the schedule and cost of the “Libby closure, demolition and reclamation.”⁶⁰ The memo states that “Libby management has developed a punch list of projects to be completed, with most of the remaining work to be accomplished during May, June and early July 1993.”⁶¹ The attached list of “Items Remaining for Completion” included, for the Screening Plant, “[c]lean up all piles of vermiculite,” “[c]lean up all extraneous material,” and “[r]emove piles of vermiculite from lot #4.”⁶²

Wolter was copied on subsequent monthly reports that included the status of the “punch list” items.⁶³ The reports for July and August 1993 reflect that “[w]ork has also started on hauling vermiculite waste piles from the Screen Plant area back up to the mine area.”⁶⁴ The report for September 1993 states that the only task remaining to be completed is “the removal of the suspension cables across the Kootenai River.”⁶⁵ As Peronard testified, these reports showed “that all of the major tasks on Government Exhibit 607 had, in fact, been completed.”⁶⁶

In March 1993, Alan Stringer wrote a letter to the Mayor of Libby confirming Grace’s intention to donate the former Export Plant property to the

⁶⁰ GX 607.

⁶¹ *Id.*

⁶² *Id.*

⁶³ DX 15033; 15034; 15035.

⁶⁴ *Id.*

⁶⁵ DX 15035.5.

⁶⁶ Tr. 1226:1-11 (Mar. 3, 2009).

City.⁶⁷ Stringer copied Wolter on that letter.⁶⁸ The actual transfer of the Export Plant property, however did not occur until May 1994, several months after Wolter had left Grace.⁶⁹ Apart from the one letter on which Wolter was copied, there is no evidence that he had any awareness of, let alone involvement in, the donation of the Export Plant property to the City of Libby.

In July 1993, Wolter wrote a memo to J.G. Rogan, attaching a series of documents relating to the sale of the Libby properties, principally the former mine site. One of the attachments is a memorandum from Stringer in which he analyzed options for sale of the mine site.⁷⁰ Stringer set forth the pros and cons of four separate options, noting the fact that major companies that might have been interested in the property generally were not because of the long-term restrictions on mining activities. Stringer noted that “I doubt that any other large corporation will come forward with an offer to buy the entire property. If Grace is going to be able to transfer all of the future responsibilities and liabilities to someone else, they are going to have to be willing to sell to some small organization. To someone who wants the property for more than just turning a profit.”⁷¹

⁶⁷ GX 606.

⁶⁸ *Id.*

⁶⁹ GX 612.

⁷⁰ GX 608.

⁷¹ *Id.*

In early 1994, Wolter left Grace on bad terms.⁷² Thereafter, Grace hired Wolter as a consultant to help sell the mine site because of his familiarity and experience with the property.⁷³ Grace ultimately sold the site to Lum and Mark Owens through their company, KDC.⁷⁴ The Owenses pursued Wolter as a possible business partner because of his experience with mining and reclamation, and his relationship with the Montana DEQ.⁷⁵ After KDC bought the property, and after getting Grace's approval, Wolter became a minority owner of KDC.⁷⁶ Lum Owens sold his interest in the company, leaving Mark Owens as the majority shareholder.⁷⁷

From 1995 through 1999, Wolter worked on reclamation of the property and plans for its development.⁷⁸ He also made plans to build a home on the Flyway.⁷⁹ During this nearly five-year period, there is absolutely no evidence of contact between Wolter and Grace, or between Wolter and the other Defendants.

When the EPA arrived in 1999, it asked KDC for permission to go onto the mine site to inspect, investigate and conduct testing.⁸⁰ Mark Owens and Jack

⁷² Tr. 5699:8-25 (Apr. 15, 2009).

⁷³ Tr. 5655:21-5656:17 (Apr. 15, 2009).

⁷⁴ GX 614.

⁷⁵ Tr. 5634:3-5635:12 (Apr. 15, 2009).

⁷⁶ Tr. 5636:17-5637:10 (Apr. 15, 2009).

⁷⁷ *Id.*

⁷⁸ Tr. 5662:1-5663:4 (Apr. 15, 2009).

⁷⁹ Tr. 1556:22-1557:6 (Mar. 4, 2009).

⁸⁰ Tr. 5666:20-5667:5 (Apr. 15, 2009).

Wolter gave the EPA unrestricted access to the KDC properties and fully cooperated with the EPA's investigation.⁸¹

In July 2000, Wolter and Owens sold a majority in interest in KDC back to Grace—with the knowledge, consent, and encouragement of the EPA—so that the EPA could deal directly with Grace on issues related to the clean up of the properties.⁸² Wolter did not want to sell and give up his dream of developing them and living in Libby.⁸³ Because of his bad feelings towards Grace, he especially did not want to sell to them.⁸⁴

Although he ultimately agreed, his resolve to go forward with the sale was tested repeatedly in the course of the negotiations. As Dale Cockrell testified, the negotiations were difficult and contentious. Grace took aggressive positions with KDC and with Wolter in particular.⁸⁵ Cockrell testified unequivocally that he saw nothing to suggest that Wolter and Grace were involved in an illegal conspiracy.⁸⁶ To the contrary, the best that could be said of their relationship was that there was no love lost between them.⁸⁷ At least twice during the negotiations, Wolter wanted to walk away from the deal, but Owens, who had a majority interest in KDC,

⁸¹ Tr. 5667:13-5668:9; 5684:6-13 (Apr. 15, 2009); 1178:1-24; 1186:4-1187:1 (Mar. 3, 2009).

⁸² Tr. 1154:9-15; 1188:1-18 (Mar. 3, 2009); 5668:17-5669:25; 5688:23-5689:11; 5700:1-17 (Apr. 15, 2009).

⁸³ Tr. 5699:8-16 (Apr. 15, 2009).

⁸⁴ Tr. 5699:8-25 (Apr. 15, 2009).

⁸⁵ Tr. 5698:1-23; 5701:6-5702:18 (Apr. 15, 2009).

⁸⁶ Tr. 5703:2-14 (Apr. 15, 2009).

⁸⁷ *Id.*

insisted on going forward.⁸⁸ Wolter tried to obtain a right of first refusal, an option to re-acquire the properties if Grace ever sold them, but Grace rejected this proposal.⁸⁹

None of this evidence suggests, let alone could prove beyond a reasonable doubt, that after November 1990 Wolter agreed to endanger members of the Libby community, or re-affirmed a prior agreement to do so. The limited information Wolter received about fiber exposures in the ambient air near the mine facilities following the closure of the mine and mill indicated that fiber levels were far below the PEL.⁹⁰ The record also shows that Montana DEQ employee Pat Plantenberg and Lincoln County health official Kendra Lind in 1993 or 1994 confirmed to Wolter's future business partner Mark Owens that there were no air quality problems around the mine site.⁹¹

Wolter had no involvement in selling the Screening Plant or any of the other smaller parcels of land in and around Libby. The only evidence of Wolter's involvement in the transfer of the Export Plant to the City of Libby is a "cc" on a single letter in 1993, a year before the actual transfer occurred.⁹² This evidence is insufficient to prove his agreement to do anything with respect to those properties,

⁸⁸ Tr. 5671:1-5672:19; 5702:19-21 (Apr. 15, 2009).

⁸⁹ Tr. 5700:20-5701:5 (Apr. 15, 2009).

⁹⁰ GX 596.

⁹¹ Tr. 5637:11-5638:9; 5676:25-5682:7 (Apr. 15, 2009).

⁹² GX 606.

much less to release asbestos through their transfer. Further, the information Wolter received from Libby during the demolition and clean-up process clearly indicated that all piles of vermiculite at the Screening Plant had been hauled to the mine site and properly disposed.⁹³ There is no evidence to suggest that he thought otherwise with respect to the Export Plant.

The so-called “small buyer” memo, Government Exhibit 608, does not establish or even support the existence of an agreement to endanger the Parkers, the Burnetts, or anyone else. First, the memo addresses the sale of the mine site rather than the Export or Screening Plants. The indictment does not allege knowing endangerment on the mine site.

Second, there has been absolutely no testimony whatsoever about the document. Read in context, the memo says no more than that, because of the long-term restrictions on mining activities, it was unlikely that any major company would be interested in buying the property to operate as *a mine*. Instead, Stringer posits, Grace would need to sell to a smaller buyer interested in something other than turning a profit through mining.

Wolter’s involvement in the sale of the mine property to KDC in 1994 proves no agreement to endanger. He was hired to work as a consultant to help sell the property, and did so. The fact that, immediately following the sale to KDC,

⁹³ GX 607; DX 15033-15035.

Wolter became a part-owner of that company refutes any suggestion that he believed the vermiculite on the mine site or the Flyway was dangerous or that he was part of a conspiracy to “unload” contaminated properties. It would be unreasonable for the jury to infer that Wolter knew that vermiculite concentrate was a deadly hazard, when he chose to assume financial responsibility for the properties, undertake the reclamation of the mine site, and, most importantly, build a home smack in the middle of that hazard.

In 1999, when the EPA arrived in Libby, Wolter and Mark Owens gave EPA personnel unrestricted access to the KDC properties.⁹⁴ Mark Owens testified that Wolter wanted to do everything possible to cooperate with the EPA.⁹⁵ Wolter’s response was wholly inconsistent with the notion that he was participating in an agreement to release asbestos into the ambient air. Had he been a member of such a conspiracy, his natural reaction would have been to keep EPA off of the properties and to immediately communicate the situation to his co-conspirators. There is no evidence that he did either of those things. The non-existence of a conspiracy between Wolter and Grace is further confirmed by the adversarial behavior of those parties during the negotiation of the re-sale of the Libby properties to Grace in July 2000.⁹⁶

⁹⁴ Tr. 5667:13-23 (Apr. 15, 2009).

⁹⁵ Tr. 5667:24-5668:9 (Apr. 15, 2009).

⁹⁶ Tr. 5699:8-25 (Apr. 15, 2009).

In short, the evidence of Wolter's conduct during the period of November 1990 to July 2000 not only fails to prove Wolter's agreement to knowingly release asbestos into the ambient air, but proves that he *did not* enter into any such agreement.

2. There is No Evidence Wolter Believed that He Was Endangering any Resident of Libby.

The Government's proof of the endangerment object of Count One also fails for lack of proof that Wolter acted with the requisite mental state. Specifically, in addition to finding that Wolter agreed to knowingly release or cause a release of asbestos into the ambient air, the jury would have to find that, at the time he so agreed, he knew that the release would place certain residents of Libby in imminent danger of death or serious bodily harm, and that he acted with the purpose of inflicting that harm. *United States v. Feola*, 420 U.S. 671, 686 (1975) (In conspiracy case, Government "must prove [alleged conspirator had] at least the degree of criminal intent necessary for the substantive offense itself."); *United States v. Licciardi*, 30 F.3d 1127, 1131 (9th Cir. 1994). Proof of this mental state would, in turn, require the Government to prove that Wolter believed (after November 1990) that exposure to Libby vermiculite concentrate through normal human activities was hazardous and potentially deadly. There is no such proof.

After Wolter left Grace on bad terms in 1994, he had no further reason to visit, or to associate himself with, the town of Libby. Had he believed that the

town was blanketed in deadly asbestos, he would logically have hastened to distance himself from the town. Instead, he did the opposite.

By buying a minority interest in KDC, Wolter linked his future and his fortunes to Libby.⁹⁷ From 1995 through 1999, Wolter regularly visited Libby as he worked to finish the reclamation of the former mine site and to explore the development of KDC's properties.⁹⁸ On those visits, Wolter toured the KDC properties with Mark Owens, taking no precautions whatsoever against asbestos exposure.⁹⁹ Wolter participated in the Montana DEQ's annual environmental inspections of the mine site.¹⁰⁰ Mark Owens took those inspections to mean that the State of Montana knew of and was comfortable with the environmental condition of the property.¹⁰¹ It is logical to infer that Wolter viewed them in the same way.

Wolter also had a "romantic" attachment to the Libby area and made plans to build a house on the property known as the Flyway, which was adjacent to the Parker's property.¹⁰² Wolter brought his wife to Libby, where they toured the mine site and the Flyway.¹⁰³ He began plans to build a log home on the Flyway, on the

⁹⁷ Tr. 5636:17-5637:10 (Apr. 15, 2009).

⁹⁸ Tr. 5662:1-3 (Apr. 15, 2009).

⁹⁹ Tr. 5663:11-5665:8 (Apr. 15, 2009).

¹⁰⁰ Tr. 5662:1-6 (Apr. 15, 2009).

¹⁰¹ Tr. 5637:11-5638:9 (Apr. 15, 2009).

¹⁰² Tr. 5663:5-10 (Romantic); 5665:9-5666:6 (House next to Parkers) (Apr. 15, 2009).

¹⁰³ Tr. 5666:10-14 (Apr. 15, 2009).

banks of the Kootenai River.¹⁰⁴ Wolter also visited Mel and Lerah Parker at the former Screening Plant, sitting in their kitchen and discussing plans for the nursery.¹⁰⁵

The Government itself elicited testimony that from 1995 to 1999, both the mine and the Flyway were covered with piles of vermiculite and heavily contaminated with asbestos.¹⁰⁶

The only reasonable conclusion that can be drawn from this evidence is that Wolter believed exposure to Libby vermiculite in the course of routine activities was safe. To find otherwise, the jury would have to conclude that he intentionally exposed himself and his wife to that risk, not once but many times, and planned to continue doing so in the future. On this record, no reasonable jury could make such a finding. Evidence from the Government's own witnesses of Wolter's interactions with Libby beginning when he bought his interest in KDC in late 1994 is dispositive of his *lack of intent* to endanger members of the Libby community.

The Government has presented almost no evidence to support a contrary finding. Certainly, there is no direct evidence that Wolter believed that any member of the Libby community was exposed to potentially deadly levels of asbestos. No witness has testified to that fact and no document states it.

¹⁰⁴ Tr. 5666:7-19 (Apr. 15, 2009).

¹⁰⁵ Tr. 1556:2-12 (Mar. 4, 2009).

¹⁰⁶ Tr.723:19-724:19 (Feb. 25, 2009) (Screening Plant); GX 672 (Flyway); 701:2-24 (Feb. 25, 2009).

The Government also has failed to prove such intent through circumstantial evidence. The Government has introduced no ambient air sample results from the town of Libby, the Screening Plant, or the Export Plant prior to 2000. Accordingly, there is no evidence that Wolter knew what such test results would have shown; nor is there evidence that such air samples would have established hazardous levels of airborne asbestos.

The Government has not shown that Wolter knew of any claims of illness or disease arising from non-occupational exposures in Libby which might have alerted him to the existence of dangerous exposure levels. To the contrary, Dr. Whitehouse testified that the first cases of purely environmental, non-occupational exposures were seen in 1998 or 1999, long after Wolter's departure from Grace.¹⁰⁷ Nor has the Government produced evidence that Wolter was aware that non-occupational exposure to vermiculite concentrate in the course of "normal human activities" (such as the walking and sweeping done by the Parkers and Burnetts) was dangerous.

The Government will likely point to Grace's product tests, research experiments (such as vermiculite salting), and related internal Grace memos to prove that Wolter knew "the secret," namely, that Libby vermiculite emitted high levels of respirable fibers even at low concentrations. But the various product tests

¹⁰⁷ Tr. 1644:12-1645:20 (Mar. 4, 2009).

all occurred substantially before 1990. The record evidence makes clear that by 1990, when the Libby facility closed and when the conspiracy to endanger had to have been formed or reaffirmed, Libby vermiculite concentrate was a very different substance than the material used in the product tests. The 1990 material was generated by a vastly improved manufacturing process, contained a far lower percentage of tremolite by weight, and was treated with soy bean oil, which had proved to be an effective binding agent. The Government presented no evidence of tests conducted by Grace or known to Wolter which showed that the 1990 product emitted high levels of respirable asbestos fibers.¹⁰⁸

Far more significant than the product tests is evidence that, for Wolter, Wood, and other managers at CPD, the OSHA PEL and the MSHA PEL were the touchstone for safety. They justifiably viewed those regulations as Government-endorsed standards for safe exposure to asbestos.¹⁰⁹ As of September 1990, fiber levels at the Libby facility had, for years, been far below the PEL. While the PEL applies to occupational exposures, it is reasonable to infer Wolter's belief that exposures in non-occupational, outdoor settings would be far less frequent and far

¹⁰⁸ Of course, even if the Government could prove that Wolter knew "the secret," (which we dispute on many grounds) the Government would nevertheless fall many steps short of proving that Wolter knew after 1990 that vermiculite concentrate was left in Libby, knew that the concentrate was sufficiently potent to release hazardous levels of asbestos into the ambient air through pedestrian human activities, knew that the resulting asbestos levels would place another person in imminent danger of death or serious bodily injury, and acted with the purpose of inflicting that harm.

¹⁰⁹ GX 90.

lower than those at the mine and mill, where vermiculite was moved, shaken, and dumped in an industrial—and often indoor—setting day in and day out. Notwithstanding the results of artificial product tests and research experiments, the fact that Grace maintained fiber levels in Libby at a fraction of the PEL strongly supports an inference that Wolter believed exposure to vermiculite concentrate in the course of regular human activity was safe.

The evidence of Government inspections in Libby further supports that inference. As Peronard testified on cross-examination, “multiple regulatory agencies [dealt] with worker health and safety at Libby.”¹¹⁰ As the CPD Vice President in charge of Libby, it is reasonable to infer that Wolter knew of those inspections and considered them as further evidence that exposure levels at the mine and mill were safe. Evidence of Wolter’s belief that industrial exposure levels were safe in turn supports his belief that non-occupational exposures were safe.

The Government may also point to the experience of O.M. Scott’s employees as proof that Wolter knew “the secret,” from which, they may argue, the jury can infer his criminal intent. The Government also relies on the O.M. Scott evidence to establish that Wolter and his co-defendants understood what would come to pass if “the secret” became known. In fact, as discussed more fully

¹¹⁰ Tr. 1008:2-3 (Feb. 26, 2009).

in Grace's motion, the O.M. Scott evidence supports neither of those arguments. O.M. Scott involved an occupational rather than a community exposure.¹¹¹ The exposures at O.M. Scott occurred long before 1990, at a time when tremolite concentrations in the vermiculite ore were much higher.¹¹² And most importantly, the O.M. Scott employees were exposed to a brew of potentially hazardous materials, including fungicide, insecticide, and herbicide, in addition to tremolite asbestos.¹¹³ Whatever the actual scientific cause of the worker illnesses at O.M. Scott might have been, their experiences do not prove Wolter's knowledge after November 1990 that Libby vermiculite concentrate would release potentially deadly levels of asbestos when disturbed through everyday activities.

3. There Is No Evidence Wolter Intended To Defraud The United States, Or Joined An Unlawful Conspiracy To Do So.

Count One also charges Wolter with conspiring to defraud the United States, specifically National Institute of Occupational Science and Health ("NIOSH") and EPA.¹¹⁴ Here, too, no jury could reasonably find that Wolter intended to defraud these agencies or that he joined an unlawful agreement to do so.

As explained in Grace's Rule 29 motion, to prove a conspiracy to defraud the United States, the Government must prove that (1) the Defendants entered into

¹¹¹ Tr. 5746:12-21 (Apr. 15, 2009).

¹¹² Tr. 5721:23-5722:5 (Apr. 15, 2009).

¹¹³ Tr. 5723:14-5724:5 (Apr. 15, 2009).

¹¹⁴ SI ¶ 71(b).

an agreement; (2) with the purpose of obstructing a lawful function of the federal government; (3) by deceit, craft, or trickery, or at least by means that are dishonest; and (4) at least one overt act in furtherance of the conspiracy to defraud occurred after November 3, 1999.¹¹⁵

An agreement to commit a crime may not be inferred merely from the fact that the defendant “had close personal relationships with the [other alleged] conspirators.” *United States v. Smith*, 26 F.3d 739, 746 (7th Cir. 1994). Nor can it be inferred solely from the fact that he was a part of an organization which acted in a concerted fashion. *United States v. Garcia*, 151 F.3d 1243, 1246 (9th Cir. 1998); *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997). Instead, the Government must produce affirmative evidence of agreement and may not “rest upon proof that a defendant acted in a way that would have furthered the goals of a conspiracy *if there had been one*.” *United States v. Adkinson*, 158 F.3d 1147, 1155 (11th Cir. 1998) (italics in original).

As this Court has explained, though the Government need not prove a formal agreement, evidence that the Defendants “simply met, discussed matters of common interest, acted in similar ways, . . . perhaps helped one another,” or

¹¹⁵ See Instruction Nos. 4-W & 5-W; *United States v. Caldwell*, 989 F.2d 1056, 1058-59 (9th Cir. 1993) (reversing a conspiracy to defraud conviction because the district court failed to instruct the jury that it had to find that the defendant conspired to defraud the Government through deceitful or dishonest means).

engaged in other innocent conduct it not enough.¹¹⁶ Rather, the Government must prove an actual agreement among the Defendants to commit the unlawful act charged.¹¹⁷ The Government has not produced any such evidence.

To establish that Wolter participated in the “defraud” object of the alleged conspiracy, the Government will likely rely on the fact that Grace failed to disclose to the EPA the results of certain studies, including the “hamster” study, the Monson study, and the report from Enbionics, and the results of various product tests.¹¹⁸ But to find Wolter guilty under the defraud object of Count One, the jury would have to find both that he was aware that Grace had an obligation to disclose these documents and that he acted with the intent to defraud the United States by agreeing to withhold them.¹¹⁹ There is no such evidence in the record.

As explained in detail in Grace’s brief, the Government has not established a duty to disclose to EPA any of the internal Grace studies or testing. The alleged conspiracy to defraud falters on this initial ground. But even if there were record evidence of such a duty, there is no evidence that Wolter knew that the results of Grace’s tests or studies had to be disclosed to the Government, or even that he was part of any discussions addressing whether they should be disclosed.

¹¹⁶ Proposed Instruction Nos. 4-W & 5-W.

¹¹⁷ *Id.*

¹¹⁸ Tr. 61:18-62:22 (Government’s Opening Statement) (Feb. 23, 2009).

¹¹⁹ Proposed Instruction Nos. 3-W, 5-W.

A number of Government Exhibits show that Wolter received the results of various tests, and that he was generally copied on internal Grace memoranda discussing the logistics, execution, and results of tests and studies. But there is no evidence that he decided or participated in deciding whether those results had to be disclosed to government authorities. Specifically, the record does not indicate any involvement by Wolter in Grace's 1983 TSCA submission.¹²⁰ The 1983 submission was not signed by Wolter, and the Government has provided no indication that he received a copy of it. The record includes only one connection between Wolter and that submission: a week before the filing of the letter, he attended a meeting at which Dr. McDonald advised Grace that it did *not* have an obligation to disclose its worker health information.¹²¹ Nor did Wolter have any involvement in Grace's 1986 TSCA submission.¹²² There is no evidence that he played any role in deciding what to include in that submission, that he was consulted about it, or that he was even aware of it.

All of this is unsurprising. Wolter is not a scientist and there is no evidence he was a lawyer or in charge of legal affairs.¹²³ During his tenure at Grace, he was not responsible for Government relations or part of the legal department. He did not supervise any of the studies and the Government never wrote to him about

¹²⁰ GX 333.

¹²¹ GX 331 at 3.

¹²² GX 492.

¹²³ Tr. 3507:22-3508:3 (Mar. 19, 2009).

them.¹²⁴ Wolter was a mining engineer responsible for Grace's mining and manufacturing operations and these submissions were far outside his areas of responsibility.¹²⁵ As there is no evidence that Wolter understood that the studies had to be disclosed (if, indeed, they did), or played any role in determining whether to disclose them, there is no basis for the jury to conclude that he could have intended to defraud the United States by withholding them.

The Government has also suggested that Government Exhibit 239, Robert Locke's November 26, 1980 memorandum to Mario Favorito, provides evidence that Wolter and other defendants joined in the alleged conspiracy to defraud the United States.¹²⁶ In that memo, on which Wolter is listed as a "cc," Locke summarizes a meeting with NIOSH researchers and outlines several options for dealing with NIOSH's proposal to study vermiculite.

Locke testified under oath in a pretrial interview with the Government that he "cooked . . . up" the options in the memorandum by himself.¹²⁷ Locke explained that Favorito requested a memo summarizing their meeting with NIOSH and options going forward; in response, Locke "laid out all the options *I could*

¹²⁴ Tr. 3345:1-5; 3356:20-3357:2; 3372:1-5 (Mar. 19, 2009).

¹²⁵ Tr. 3507:8-3508:7 (Mar. 19, 2009).

¹²⁶ By separate motion and supporting memorandum of law, Grace, Wolter, and the other Defendants are seeking relief as a result of the misconduct surrounding Mr. Locke's testimony. At a minimum, we believe that his direct testimony should be stricken from the record, and that it should not be considered in support of the Government's case. However, in the event that this Court disagrees, we explain why the Rule 29 motion should be granted even if his testimony remains in the record.

¹²⁷ Tr. 4325:9-20 (Mar. 26, 2009).

think of.”¹²⁸ In other words, Locke has admitted responsibility for the contents of the memorandum. There is no evidence that he discussed the options with Wolter (or anyone else) before writing the memorandum.

Consistent with Wolter’s overall lack of involvement in the NIOSH study, he did not attend the meeting that Exhibit 239 discusses.¹²⁹ There is no evidence he was involved in any of the subsequent meetings with NIOSH in which the Government claims the scheme to defraud was carried out.¹³⁰ Wolter’s final involvement with the alleged scheme took the same form as his initial involvement—he received a memorandum. In this instance, Wolter received a July 1981 memorandum from Wood stating that, in light of NIOSH’s revisions to its study protocol, Grace would cooperate with the agency’s study.¹³¹

These facts are insufficient to prove that Wolter entered into an agreement to defraud the United States. Ninth Circuit caselaw is clear: agreement to commit a crime may not be inferred from a defendant’s mere knowledge of a conspiracy. *United States v. Melchor Lopez*, 629 F.3d 886, 891 (9th Cir. 1980). Even if the Government could prove the existence of a conspiracy to obstruct NIOSH, the fact

¹²⁸ Tr. 3843:5-9 (Favorito requested memo); 3866:17-21 (emphasis added) (Mar. 24, 2009).

¹²⁹ Tr. 3843:15-21 (Mar. 24, 2009).

¹³⁰ GX 278; Tr. 4294:21-4295:1 (Mar. 26, 2009).

¹³¹ GX 268; Tr. 3886:12-3887:4 (Mar. 24, 2009).

that Wolter was carbon copied on a memo that on its face proposed legal conduct would not support a finding that he joined it.

The latter point is important. On its face, Locke's memorandum does not propose illegal conduct, or any "deceit, craft, or trickery" or "dishonest" means. Even if the jury could find that there was an agreement to proceed slowly and to take issue with aspects of the proposed NIOSH study, there is no evidence from which they could conclude that there was an agreement to do so by illegal means. As explained in more detail in Grace's brief, companies and individuals are allowed to disagree with their Government and to object when confronted with what they perceive to be unreasonable Government requests. Far from being criminal, such conduct is constitutionally protected speech.

Finally, throughout its case, the Government has highlighted for the jury every instance in which Wolter's name appears on a Grace memorandum. In some cases, he was the author or principal recipient. But in the vast majority, Wolter's name appears as a "cc," usually one among many. The Government hopes to imply that because Wolter received many internal communications concerning tremolite, the jury should necessarily conclude that he joined a conspiracy to defraud the United States. But those memoranda do not support that conclusion.

Not only is mere knowledge of a conspiracy insufficient to establish that a defendant has joined a conspiracy, *Melchor-Lopez*, 629 F.2d at 891, but the logic

underlying that rule applies with particular force to the context of a lawful business, in which employees communicate and collaborate towards achieving corporate goals. The clear and undisputed testimony on this point shows the problem with the Government's approach. Grace employees often were copied on memoranda discussing projects as to which they had little or no responsibility.¹³² Heyman Duecker candidly admitted that, at times, the quantity of memoranda was so great he did not even read them all.¹³³ And Bruce Williams explained that there was no significance to the fact that someone received a memo at Grace other than that he was "part of the company."¹³⁴ Indeed, Government witnesses Duecker, Williams, and Julie Yang (none of whom have been charged with a crime) authored or received many of the same documents whose receipt the Government cites as evidence of Wolter's membership in the alleged conspiracy.

B. Even if the Government Could Prove a Conspiracy, It Has Not Proved The Commission of an Overt Act Before Wolter Withdrew From the Conspiracy.

The Government has the burden of proving that each Defendant did not withdraw from the conspiracy before at least one overt act was committed in furtherance of the conspiracy.¹³⁵ In this case, the overt act must have occurred, if

¹³² Tr. 3177:12-3179:13 (Mar. 18, 2009).

¹³³ Tr. 3177:12-3179:13 (Mar. 18, 2009).

¹³⁴ Tr. 4890:11-14 (Apr. 9, 2009).

¹³⁵ Proposed Instruction No. 10-W.

at all, after November 3, 1999, the earliest date to which the statute of limitations extends.¹³⁶

One may withdraw from a conspiracy by “doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts.”¹³⁷ Where a defendant makes a *prima facie* showing of withdrawal “the burden shifts to the Government to prove beyond a reasonable doubt that the defendant did not withdraw.” *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992). The undisputed evidence shows that the Government cannot meet that burden with respect to Wolter.

The earliest overt acts within the limitations period that the Government claims were taken in furtherance of the conspiracy occurred when Stringer spoke with Peronard on or about November 23, 1999.¹³⁸ These actions were allegedly undertaken in an effort to obstruct the EPA’s investigation in Libby.

The undisputed evidence shows that, at the very same time Grace was allegedly obstructing EPA’s investigation, Wolter and KDC were assisting it. Indeed, Peronard testified that upon his arrival in Libby, KDC granted him immediate access to the mine site and Flyway properties, with Mark Owens taking

¹³⁶ Proposed Instruction No. 4-W.

¹³⁷ Proposed Instruction No. 10-W; *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464-65 (1978).

¹³⁸ SI ¶¶ 173-75.

him on a tour and answering his questions.¹³⁹ As Peronard agreed, “KDC had the option of saying, Yes, you [EPA] can go on the property, or, No, you can’t” and KDC said “Yes, you can.”¹⁴⁰ He testified that so long as Owens and Wolter controlled KDC “we never had access problems.”¹⁴¹

Owens confirmed that KDC gave EPA broad permission to come onto all of the KDC properties and testified that he did everything he could to accommodate the EPA.¹⁴² All of this was done with Wolter’s full knowledge and consent.¹⁴³

Wolter’s overt cooperation with the EPA in late November 1999 constituted withdrawal from the alleged conspiracy. Such cooperation is plainly inconsistent with the supposed purpose of the alleged conspiracy, namely, to obstruct the EPA. The cooperation of KDC and Wolter was conveyed directly to Grace through Stringer, who was present when Owens allowed Peronard on the mine site and during the three-way negotiations between EPA, KDC and Grace over whether EPA would be allowed to use the mine site to dispose of asbestos-containing from the other cleanup sites in Libby.¹⁴⁴ In light of this evidence, the Government cannot meet its burden to show an overt act within the statute of limitations that occurred *before* Wolter withdrew from the conspiracy.

¹³⁹ Tr. 1177:7-16 (Mar. 3, 2009).

¹⁴⁰ Tr. 1178:4-12 (Mar. 3, 2009).

¹⁴¹ Tr. 1178:4-12 (Mar. 3, 2009).

¹⁴² Tr. 5667:13-23 (Apr. 15, 2009).

¹⁴³ Tr. 5667:24-5668:9 (Apr. 15, 2009).

¹⁴⁴ Tr. 695:23-696:6 (Feb. 25, 2009) (mine site tour); 834:2-836:1 (Feb. 26, 2009) (three-way negotiations).

C. **Wolter is Entitled to Judgment of Acquittal on Counts Three and Four.**

The Government has not introduced any evidence that Wolter knowingly released or willfully caused a knowing release of asbestos that placed an individual in imminent danger of death or serious bodily injury. First, there is no evidence that Wolter participated in the transactions that allegedly led to releases at the properties.¹⁴⁵ Second, there is no evidence of actionable releases during the relevant time period at either location. Third, there is no evidence that Wolter had the requisite mental state. For these reasons, and those set forth in the motions filed by Grace and Defendant Bettacchi, Wolter is entitled to judgment of acquittal on these counts.

¹⁴⁵ The Government may not present any other theory of how Wolter allegedly caused a release of asbestos to the jury. “The Fifth Amendment guarantees a criminal defendant ‘[the] right to stand trial only on charges made by a grand jury in its indictment.’ After an indictment has been returned and criminal proceedings are underway, the indictment’s charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself.” *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002) (quoting *United States v. Garcia-Paz*, 282 F.3d 1212, 1215 (9th Cir. 2002)). An amendment occurs where (1) “there is a complex of facts presented at trial distinctly different from those set forth in the charging instrument,” or (2) “the crime charged in the indictment was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.” *Adamson*, 291 F.3d at 615. Allowing the jury to consider convicting Wolter of Count Three on a theory other than his alleged sale of the Screening Plant to the Parkers would constitute an impermissible amendment of the indictment. *Cf. United States v. Dipentino*, 242 F.3d 1090 (9th Cir. 2001) (reversing conviction for violating the Clean Air Act where indictment charged defendants with having failed to wet asbestos during removal but jury was allowed to consider whether defendants failed to properly dispose of asbestos after removal).

1. **There is No Evidence That Wolter Participated in Any of the Transactions.**

a. ***Wolter had no involvement in the sale of the Screening Plant to the Parkers.***

The Parkers purchased the Screening Plant property in November 1992, and moved onto the property in October 1993, all before they had any contact with Jack Wolter.¹⁴⁶ The Parkers testified that Stringer negotiated the sale directly with them.¹⁴⁷ DeShazer confirmed this fact, noting that Stringer brought him in to handle the paper work after the terms of the deal were already set.¹⁴⁸

Wolter's name does not appear on GX 604 (the purchase-sale agreement for the Screening Plant) and there has been no evidence that he had any involvement in preparing it.¹⁴⁹ The first connection of any kind between Wolter and the Parkers occurred in October 1993, almost a year after the sale of the former Screening Plant, and after the Parkers were already living there, when the Parkers received a form solicitation letter, signed by Wolter, concerning the sale of the mine site.¹⁵⁰ Both Mel and Lerah Parker testified that they first met Wolter in January 1994, more than a year *after* they purchased the Screening Plant from Grace.¹⁵¹ On that occasion, the Parkers and Wolter discussed the mine site, not the Screening

¹⁴⁶ GX 604; Tr. 1341:8-10 (Mar. 3, 2009).

¹⁴⁷ Tr. 1333:1-2 (Mar. 3, 2009).

¹⁴⁸ Tr. 5590:24-5591:20 (Apr. 14, 2009).

¹⁴⁹ GX 604.

¹⁵⁰ GX 609.

¹⁵¹ Tr. 1334:15-1335:5; 1353:22-1354:12 (Mar. 3, 2009); 1476:7-9; 1525:13-17 (Mar. 4, 2009) and GX 604 (Screening Plant sale concluded November 1992).

Plant.¹⁵² By that time, the Parkers had been operating their nursery on the site for some time.

The Parkers subsequent actions confirm that Wolter had nothing to do with the sale. In August 2000, the Parkers filed a lawsuit stemming from their purchase of the Screening Plant and named six defendants.¹⁵³ Mel Parker testified that they named everyone they “believed had any role with the sale of the screening plant[.]”¹⁵⁴ This list did not include Wolter.¹⁵⁵

The Government has failed to present any evidence from which the jury could reasonably conclude that Wolter participated in the sale of the Screening Plant to the Parkers. For that reason, Wolter is entitled to judgment of acquittal on Count Three.

b. ***Wolter had no involvement in the disposition of the Export Plant.***

There is no evidence Wolter that leased the export plant to the Burnetts or sold it to the City of Libby. Grace leased a portion of a building at the Export Plant to Melvin Burnett in 1989.¹⁵⁶ The lease was signed by Alan Stringer for Grace and witnessed by Robert Marozzo, another Grace employee.¹⁵⁷

¹⁵² Tr. 1353:22-1354:12 (Mar. 3, 2009).

¹⁵³ Tr. 1476:20-1478:13 (Mar. 4, 2009).

¹⁵⁴ Tr. 1477:2-5; 1478:11-13 (Mar. 4, 2009).

¹⁵⁵ *Id.*

¹⁵⁶ GX 550; Tr. 5987:7-5988:22.

¹⁵⁷ *Id.*

In approximately April of 1994, the property was either donated or sold to the City of Libby, at which point Mr. Burnett negotiated a new lease directly with the City.¹⁵⁸ The Government's only documentary evidence of the transaction is GX 612, the deed conveying the property from Grace to the City. There is no testimony as to who handled the transaction for Grace. Apparently seeking to connect this transaction to Wolter, the Government has offered a 1993 letter written by Stringer to Libby Mayor Fred Brown, stating that Grace was willing to donate the property to the City.¹⁵⁹ Thus, the only record evidence is a letter, devoid of context, indicating, at most, that Wolter was aware of an offer to donate the land to the City.

There is no evidence that Wolter had any other involvement in the lease to Burnett. Indeed, there is no evidence that Wolter even knew it had occurred. Apart from the Stringer letter to Brown, there is no suggestion that he knew of, or played any role in, the donation. Once again, the Government is seeking to convict Wolter of a serious crime -- knowingly placing people in grave danger -- merely because he was copied on a letter, an act over which he had absolutely no control. Such a tenuous link between Wolter and the alleged offense cannot support the submission of this charge to the jury.

¹⁵⁸ Tr. 5993:13-22.

¹⁵⁹ GX 606.

2. There is No Evidence of an Actionable Release at the Screening Plant or the Export Plant During the Relevant Time Periods.

This Court has indicated that the only “releases” actionable under the Clean Air Act are those into the “ambient air,” defined as “outdoor air external to buildings and accessible to the general public.” Proposed Instruction no. 19-W. The Parkers testified that they, their relatives, and their customers moved around in areas contaminated with vermiculite after 1993, and that they engaged in outdoor activities that would have disturbed the vermiculite, thereby causing releases of asbestiform materials.¹⁶⁰ The Government did not, however, present evidence of any such releases during the relevant period.

The evidence establishes that water effectively suppresses the release of dust and tremolite fibers from vermiculite concentrate.¹⁶¹ Indeed, that was the entire premise behind the construction of the wet mill. To the extent, then, that vermiculite at the former Screening Plant was wet, or even damp, between November 3, 1999 and June 15, 2000, it is reasonable to infer that it did not release tremolite fibers and, certainly, that it did not release fibers sufficient to create an imminent danger. For the same reason, it is also reasonable to infer there were no releases at the Export Plant during that period.

¹⁶⁰ Tr. 1530:16-1531:12 (March 4, 2009).

¹⁶¹ Tr. 4575:5-9 (Apr. 8, 2009).

By early November, the weather in Libby is wet, cold, and often frozen.¹⁶² At least through March, and often into April, the ground in Libby is covered with snow and ice.¹⁶³ Even after the snow melts, the ground freezes at night and thaws during the day. Thus, at least until mid-to-late-Spring of 2000, weather conditions were such that there was no reasonable likelihood of an outdoor release.

By the time the ground had thawed in late Spring of 2000, the Parkers were on notice of the potential dangers. Lerah Castleton testified that after the *Seattle Post Intelligencer* stories appeared, she stopped visiting the Screening Plant with her children, and took greater care when she moved around the property.¹⁶⁴ Paul Peronard also testified that he and his response crew visited the Screening Plant property regularly beginning in late November 1999, to conduct sampling and to assess clean up activities.¹⁶⁵ By mid-June of 2000, the EPA had ordered the Parkers to leave the property.¹⁶⁶ It is reasonable to infer from Lerah Castleton's conduct, and from the regular presence of the EPA team that by the Spring of 2000, that by the time the vermiculite began to dry out, the Parkers were not causing any disturbances capable of releasing hazardous levels of asbestiform materials into the ambient air.

¹⁶² Tr. 775:5-12 (Feb. 25, 2009); 5123:23-5125:2 (Apr. 10, 2009).

¹⁶³ *Id.*

¹⁶⁴ Tr. 5081:19-5082:1 (Apr. 10, 2009).

¹⁶⁵ Tr. 683:12-685:14 (Feb. 25, 2009).

¹⁶⁶ Tr. 1191:9-11 (Mar. 3, 2009).

Perhaps recognizing this basic evidentiary problem, the Government elicited evidence that the Parkers regularly swept out the “long shed.”¹⁶⁷ The Government apparently believes that releases caused by this sweeping can form the basis for their charge. For two reasons, the Government is wrong. First, as discussed in Grace’s brief, a release in the long shed is not a release into the “ambient air,”; that is, not a release “external to buildings and accessible to the general public.”¹⁶⁸ Second, even if a release caused by sweeping in the long shed could constitute a release into the ambient air, the factual evidence at trial makes clear that any such sweeping after November 3, 1999 could not have given rise to a knowing endangerment violation. The Parkers testified, that from the time they moved onto the property in October 1993, they swept the long shed regularly, three or four times a year, and that each sweeping exercise took three or four days.¹⁶⁹ Even if one assumes—purely for the sake of argument—that the long shed contained asbestos-contaminated vermiculite when the Parkers first began sweeping in 1993, a reasonable jury could only conclude that by November 1999, after six years of sweeping, three or four times a year, none of that original material would have remained. Accordingly, whatever asbestiform material may once have been in the long shed, by 1999, it had long since been removed. No reasonable jury could find

¹⁶⁷ Tr. 1364:11-19 (Mar. 3, 2009).

¹⁶⁸ Proposed Instruction no. 19-W.

¹⁶⁹ Tr. 1364:23-25 (Mar. 3, 2009).

releases of asbestos in or from the long shed within the actionable period.

Even if there were evidence of a release of asbestos on the Screening Plant property during the relevant time period, the Government has demonstrated neither a specific, identifiable release, with a quantifiable exposure, nor that any person inhaled any asbestiform fibers. Without having identified a specific release directed at a specific individual, the Government has failed to prove that any identified person was placed in imminent danger. The Government's proof on this Count fails for that reason as well.

3. There is No Evidence That Wolter Had The Requisite Intent.

This Court has made clear that in order to establish a criminal violation of the Clean Air Act's knowing endangerment provisions through 18 U.S.C. § 2(b), the Government must prove that he acted "willfully" in causing the alleged release. Proposed Instruction no. 14-W. The parties disagree about the meaning of this instruction. Defendants claim that section 2(b) requires proof that the Defendants acted with the purpose of bringing about the substantive violation of the Act. The Government argues that it need only show that (1) the Defendants knew that third parties would release asbestos and (2) the Defendants knew that those releases would place another person in imminent danger. But even under the Government's more lenient formulation of the intent requirement, the record is insufficient to establish that Wolter had the required *mens rea*.

As discussed in detail above, Wolter's years of experience showed him that Grace's concentrate and finished products, as formulated by 1990, did not expose workers, in industrial, indoor settings, to dangerous levels of asbestos. Accordingly, even if there were record evidence that he participated in the sale of the property and knew of any outdoor piles of concentrate—and there is no evidence that he did—he had no reason to believe that those conditions presented the risk of a release that could place another party in imminent danger. As discussed more fully above, the undisputed evidence of Wolter's conduct in Libby between 1994 and 1999 is fundamentally inconsistent with the mental state required by this offense.

III. CONCLUSION

For the foregoing reasons, the Court should grant this motion and grant Wolter judgment of acquittal on all counts.

RESPECTFULLY SUBMITTED this 23rd day of April, 2009.

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